No. 86-436

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

WALTER L. JONES, *Pro Se, et al.*,
vs.
NIAGARA FRONTIER TRANSIT AUTHORITY, *et al.*,
Petitioner,
Respondents.

(Case No. 1).

WALTER L. JONES, *Pro Se, et al.*,
vs.
SIEGFRIED CONSTRUCTION CO., INC., *et al.*,
Petitioner,
Respondents.

(Case No. 2).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Should the Court issue a Writ of Certiorari to review Orders of the Court of Appeals for Second Circuit which (a) dismissed the appeal in action No. 1 because the District Court decision, which did not dispose of the entire action, lacked Rule 54(b) certification and (b) affirmed a District Court Order dismissing action No. 2 because it was substantially identical to action No. 1 pending in the District Court?

2. Should the Court issue an extraordinary Writ directing the District Court judge to recuse himself merely because he rendered a decision adverse to petitioner?

List of All Parties

Siegfried Construction Co., Inc. is a wholly owned subsidiary of Frontier Contractors Equipment Co., Inc.

Siegfried/Slattery is a joint venture of Siegfried Construction Co., Inc. and Slattery Equities, Inc.

Slattery Equities, Inc. is a wholly owned subsidiary of Slattery Group, Inc.

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Statement of the Case

These actions arose out of claims by the petitioner of racial discrimination and of violations of federal rules and regulations providing for participation of minority business enterprises in federally funded construction projects. The particular project involved is the construction of the light rail rapid transit system in Buffalo, New York, a project sponsored by the Niagara Frontier Transportation Authority ("NFTA"). The gravamen of the complaint in action No. 1 is that the failure of the NFTA to award the petitioner corporation contracts pursuant to its low bids violated the civil rights of the petitioner and its president and sole stockholder as well as federal laws providing for participation of minority business enterprises in federally funded projects. The complaints in that action and in action No. 2 allege that the failure of the prime contractors on the project to award sub-contracts to the petitioner corporation constitutes wrongdoing of a similar nature.

Beginning in late 1978, the respondent, NFTA, advertised for bids on sections of the rapid transit project. Jones Development submitted bids as prime contractor on several of the major contracts and was low bidder on four. However, the NFTA rejected all of those bids giving as its reasons that the corporation had insufficient assets and equipment to handle such large contracts, that it did not have the requisite experience to perform the projects, that it failed to post bid bonds with its bids and that it failed to establish that it had the ability to obtain performance bonds and labor and material bonds in the event that any of the contracts were awarded to it.

As a result, in each case where Jones Development was the low bidder, its bid was rejected and the bid of the next low bidder was accepted by the NFTA.

Action No. 2, which is alleged only on behalf of the petitioner, Walter L. Jones, Individually, also makes claims for alleged violations of the same statutes and regulations but does not name any of the government entities as defendants. It is based principally on the failure of Jones Development to obtain subcontracts on any of the projects.

Originally, action No. 1 was commenced against the NFTA, the Urban Mass Transportation Administration ("UMTA") and the New York State Department of Transportation ("DOT").

The complaint was amended several times. The first amended complaint was dated December, 1980, and also named the NFTA, the UMTA and the DOT as the only defendants. The second amended complaint was served in February of 1981 and added to the defendants named in the original complaint and the first amended complaint several general contracting companies which had obtained prime contracts on the project, as well as several trade associations and labor unions.

Motions were made by various of the defendants to dismiss the complaint for failure to state a claim upon which relief could be granted. In addition, motions were made to dismiss the individual claims of Walter L. Jones on the ground that only claims on behalf of the corporation, Jones Development, were stated, and further, that the entire complaint be dismissed on the ground that the corporation was not represented by counsel as is required by law.

On April 17, 1981, the motion to dismiss was granted with respect to the individual claim of Mr. Jones and the District Court further ruled that the corporation must be represented by counsel (App. 5-17).[1] Mr. Jones retained

[1] Numbers in parentheses preceded by "App." refer to pages of the Petition for Writ of Certiorari.

counsel, John L. Hargrave, to represent the corporation and there soon followed a third amended complaint. This added a large number of additional defendants, individual officers of the corporate defendants previously named and a number of companies claimed to be "phoney, minority business enterprises and MBE fronts."

Shortly later, Mr. Jones dismissed Mr. Hargrave and obtained new counsel, Charles L. Davis, for the corporation. Mr. Davis soon thereafter filed a fourth amended complaint, referred to on its face as "Amended Complaint", which dropped from the suit all defendants except the NFTA, UMTA, Siegfried-Slattery, Darling, Cowper, Fruin-Colnon/Traylor Bros./Onyx Equipment and their corporate officers. This version of the complaint was followed a week later by a Fifth Amended Complaint making minor changes in its immediate predecessor. This is the complaint which the petitioner refers to as the "unauthorized" amended complaint.

On October 8, 1981, the District Court issued an order to show cause why the action should not be deemed dismissed as to each of the previously named defendants not named in the most recent complaint (App. 19-20). On the return date no one appeared for the petitioner to oppose the motion and on November 2, 1981, the District Court ordered the action dismissed as to the unnamed defendants (App. 22-24).

Motions to dismiss this complaint were made as well. When these motions were scheduled by the court for argument in November of 1982, Mr. Jones advised the court and the defendants that Mr. Davis was no longer representing the corporation. At the same time, Mr. Jones, acting *pro se* for the corporation once again, served a motion to amend a sixth time together with a copy of a proposed sixth amended complaint. In this

version of the complaint, which was stated to be a class action, Mr. Jones named himself as the only plaintiff in action No. 1, omitting the name of Jones Development, claiming assignment of Jones Development's cause of action to him personally. This motion to amend was denied, the court below holding that Mr. Jones could not cause his corporation to assign its claim to him personally so that he could prosecute the action *pro se*.

Faced with the necessity of obtaining new counsel for the corporation or suffering dismissal of the claim, Mr. Jones appealed *pro se* to the Circuit Court of Appeals which affirmed the action of the district court in an opinion reported at 722 F.2d 20 (1983).

At the time of the motions to dismiss and his cross motion to file a sixth amended complaint, Mr. Jones also moved for reconsideration of the court's order of November 2, 1981, dismissing the action as to the host of defendants who had been omitted from the fourth and fifth amended complaints and who had been formally dismissed from the action by the order of November 2, 1981 (App. 22-24). In view of its disposition of the motion to amend, the district court found it unnecessary to pass on the application. This proved to be the first of several attempts by Mr. Jones and his counsel to obtain reversal by the district court of its orders of April 17, 1981 and November 2, 1981.

Shortly thereafter, and while Mr. Jones pursued his appeal from the lower court's order of December 6, 1982 in action No. 1, he, acting *pro se*, commenced action No. 2 by filing the complaint on January 26, 1983.

The complaint in action No. 2 was made on behalf of Mr. Jones personally and included as defendants eighteen of the defendants who had been dismissed from action No. 1 by the court's order of November 2, 1981.

In response to the Second Circuit's affirmance of the lower court's decision that Jones Development had to be represented by an attorney, an appearance was made by Paul Volcy, Esq., on December 16, 1983. Mr. Volcy withdrew from the case in May of 1984 before anything of substance took place and Mr. Hargrave, the corporation's original attorney, was substituted in his place.

On August 2, 1984, Mr. Hargrave, on behalf of Jones Development, and Mr. Jones, ostensibly on behalf of himself, moved to "amend and consolidate" actions 1 and 2. There commenced an extraordinary period of activity by Mr. Jones and his counsel which consumed several months and which saw the complaint undergo almost continuous revision.

Meanwhile, on October 11, 1984, the District Court issued a *sua sponte* show cause order why action No. 2 should not be dismissed on the ground that it involved claims identical with those in action No. 1. On February 11, 1985, the court dismissed action No. 2 (App. 66-70). A notice of appeal was filed but later withdrawn without prejudice.

On February 12, 1985, the day following the decision dismissing action no. 2, the district court issued an order declining to reinstate the individual claims of petitioner and to reinstate as defendants all those parties who had been dismissed from the action pursuant to his order of November 2, 1981; the motions of the defendants to dismiss the complaint were denied without prejudice to renew (App. 26-33). The attorney for the petitioner then moved for an order certifying that decision for appeal. The petitioner then filed a notice of appeal but withdrew it when Staff Counsel for the Second Circuit pointed out that the form of the order was not in accordance with the Second Circuit's requirements.

The effect of these decisions was to deny the application to "amend and consolidate" the complaints in the two actions. It also rebuffed all attempts to obtain amendment of the then standing amended complaint, that dated August 14, 1981. Consequently, the defendants renewed their motions to dismiss.

Mr. Jones and his counsel filed a cross motion on March 22, 1985, making yet another application to amend the complaint. In addition, this cross motion also requested that the court "reconsider" its orders of February 11 and February 12, 1985, refusing to vacate the orders of April, 1981 and November, 1981 dismissing the action as to Mr. Jones personally and dismissing it as to a number of the defendants.

On April 1, 1985, the return date of the defendants' motions to dismiss, the court granted the application of counsel for the petitioner to postpone a hearing of the motions to dismiss to a time following decision on the motion to amend, made returnable on April 29, 1985.

Before that date arrived, two more versions of the complaint were served, one on April 17 and one on April 26, 1985.

On April 29, 1985, the court granted the plaintiff permission to file an amended complaint.

Still another version of the complaint, apparently the fourteenth, was filed on May 13, 1985. Upon application of counsel for the defendants, the court issued an order on May 29, 1985, directing that the May 13 complaint be deemed a nullity.

Since this complaint alleged claims for Mr. Jones personally and against the defendants who had been dismissed from the case in November 1981, counsel for the defendants again made motions to dismiss as to those matters.

These motions provoked a cross motion by the plaintiff and a veritable flood of papers. Argument was held on all the motions on September 16, 1985 and before the court could render a decision on them, petitioner requested the district court judge to disqualify himself on the grounds of bias and prejudice. The court denied this application on October 11, 1985 (App. 35-38).[2]

On October 15, 1985, the Court refused to certify for appeal, pursuant to F.R.C.P. Rule 54(b), its prior order dismissing petitioner's individual causes of action or its prior order dismissing certain defendants (App. 39-60).

On appeal to the Second Circuit, petitioner's motion to consolidate the appeals was granted. Thereafter, in action No. 1 the Second Circuit granted defendants' motions to dismiss the appeal because the order appealed from, which did not dispose of all the issues in this multi-claim, multi-party action, lacked Rule 54(b) certification (App. 1). Petitioner's motion for rehearing and rehearing *en banc* was denied (App. 3).

In action No. 2, the Court of Appeals for the Second Circuit affirmed stating that the District Court had the power to dismiss an action that involved substantially the same rights, facts and request for relief as that of another pending action (App. 62). The Court of Appeals determined those requirements were met (App. 63) and found that the District Court did not abuse its discretion in dismissing the action (App. 64). The Court of Appeals also noted that petitioner may seek leave to file a supplemental pleading for any action that post-dated the commencement of the 1980 action (action No. 1) (App. 63-64). Petitioner's motion for a rehearing *en banc* was denied (App. 65).

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[2] The foregoing statement of the case is substantially identical to the one contained in respondent's brief to the United States Court of Appeals for the Second Circuit. The principal author of that portion of the brief was John J. Cooney, Esq.

ARGUMENT

POINT I

The Court of Appeals did not err when it dismissed the appeal in action No. 1.

In action No. 1, petitioner attempted to appeal a decision which dismissed his individual causes of action. However, since the Corporation's claims were still pending in this multi-party, multi-claim action, the decision to dismiss was not appealable unless the District Court directed the entry of a final judgment, pursuant to Rule 54(b) of the F.R.C.P. The District Court refused to do so and, therefore, the Court of Appeals properly dismissed the appeal for lack of an appealable order.

Petitioner, citing *Matter of Vuitton Et Fils Sa*, 606 F.2d 1 (2d Cir. 1979) and *City of Santa Clara, Californina v. Andrus*, 572 F.2d 660 (9th Cir. 1978), argues that it was error for the Court of Appeals to disimiss the appeal for lack of Rule 54(b) certification. Neither case supports Petitioner's argument. *In Matter of Vuitton* the Court of Appeals exercised its mandamus jurisdiction and instructed the District Court to issue an *ex parte* temporary restraining order. That case did not involve the court's appellate jurisdiction.

In *City of Santa Clara, California v. Andrus, supra*, the issue was whether the District Court's dismissal of the action "without prejudice" was an appealable, final order under 28 U.S.C. §1291. Since the judgment disposed of the action, the Court of Appeals found it was appealable. Neither case relied upon by Petitioner involved certification under Rule 54(b) of the F.R.C.P. Consequently, Petitioner's argument that the court erred in dismissing the appeal is meritless.

Petitioner also asserts that the dismissal of his individual cause of action denied him due process of law because the Court issued an order to show cause and there was no hearing held prior to the decision (Petition for Writ of Certiorari, pp. 18-19). Petitioner was notified of the pending motion to dismiss, was presented an opportunity to be heard and opposed the motion. Thus, there was no denial of due process and Petitioner's string citation to a series of fundamental due process cases is not persuasive.[3]

Petitioner, citing *Flast v. Cohen*, 392 U.S. 83 (1968); *Haines v. Kerner*, 404 U.S. 519 (1972); *Cannon v. University of Chicago*, 441 U.S. 677 (1979), presents a substantive argument that the District Court erred in dismissing his individual causes of action because he "has standing to pursue his claims" (Petition for Writ of Certiorari, p. 21). As this Court explained in *Flast v. Cohen, supra*, "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . ." 392 U.S. at 98-99.

Thus, the mere fact that plaintiff is black and, therefore, a member of the class of individuals for whom minority business enterprise statutes were enacted, does not necessarily make him a proper party to request

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[3] Petitioner relies primarily upon *Armstrong v. Manzo*, 380 U.S. 545 (1965), in support of his due process argument. (*See*, Petition for Writ of Certiorari, pp. 18, 19, 24). In that case the issue was "whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him of due process of law so as to render the adoption decree constitutionally infirm . . . ." (*Id.*, at 549-550). Respondents are unable to discern any theoretical connection between *Armstrong* and this case.

adjudication in this case. Indeed, as the District Court explained in its decision dismissing petitioner's individual causes of action:

> "To meet this constitutional standing test, plaintiff must show that he or she or it has sustained some direct injury as a result of defendant's alleged conduct . . . .
>
> "Jones has failed entirely to demonstrate the requisite injury to establish his constitutional standing to pursue this case as a plaintiff . . . . There is no claim or indication that any of the defendants acted against Jones in his individual capacity. According to plaintiff's own pleadings, all of defendants' proported actions were taken against the corporation, not against Jones personally. Similarly, the alleged injuries—to wit, financial losses resulting from the corporation's non-participation in the contract project and public defamation—were inflicted solely upon the corporation, not upon Jones as an individual.
>
> "It is certainly understandable that as owner and president of the corporation, Jones feels personally angered and aggrieved by defendants' alleged discriminatory conspiracy to deprive 'his' corporation of a construction contract. Such feelings, however, do not translate into the constitutional standing he needs to be entitled to sue, on behalf of either himself or the corporation, these defendants for their alleged actions . . . ." (App. 8-10).

Petitioner fails to rebut or even address the legal reasoning set forth in the District Court' decision.

In sum, the Court of Appeals was correct in dismissing the appeal for lack of Rule 54(b) certification, and petitioner has failed to set forth, or even allege, any important question of federal law which would warrant review by the court at this time. Accordingly, the Petition for Writ of Certiorari should be denied.

POINT II

The legal issue of whether the District Court abused its discretion in dismissing the complaint because it was substantially identical to another pending action does not warrant review by this Court.

The decision by the District Court to dismiss action No. 2 because it was substantially identical to action No. 1, which was pending in the District Court, was simply an internal docket management decision. This conclusion is supported by the fact that the District Court noted that the proper procedural vehicle for alleging new events is a supplemental pleading and not the basis for a distinct lawsuit (App. 69). Consequently, the District Court decision, and the Court of Appeals' affirmance, in action No. 2 does not involve an important question of Federal law, nor are the decisions such an extreme departure from acceptable judicial practice to warrant the exercise of this Court's supervisory power over the federal judiciary.

Petitioner's sole claim is that this decision conflicts "with recent decisions of this and other cases and that the District Court invoked the "bar" doctrine, which is patently inconsistent with the decisions in *Compagnine DesBauxites v. L'Union*, 723 F.2d 357 (1983); [and other cases]" (Petition for Writ of Certiorari, p. 26). In *Compagnine*, the Third Circuit Court of Appeals stated that "bar" is a branch of *res judicata* "invoked in order to prevent a second suit on a cause of action which has already been decided on the merits." 723 F.2d at 360.

Here, the District Court did not dismiss the action on the grounds of "bar", *res judicata* or collateral estoppel. Rather, the Court simply dismissed the action because it was substantially identical to another action pending in that court.

Apparently, petitioner reasons that the District Court invoked the "bar" doctrine because it noted that action No. 2 involved "certain defendants as to whom similar complaints were (previously) ordered dismissed with prejudice . . . ." (App. 68). To the extent that concepts of *res judicata* or collateral estoppel may have been involved in the District Court's decision regarding the previous dismissal with prejudice as to certain defendants (App. 69, fn. 1) the use of such concepts was perfectly proper. The procedure for a litigant receiving an adverse decision is an appeal, not the commencement of an entirely separate action to relitigate the issue. At the appropriate time (upon the final determination of the entire action) petitioner may avail himself of the appellate process thus bringing up for review the dismissal of petitioner's individual cause of action as well as the dismissal of various defendants.

In sum, the District Court decision does not conflict with any decisions of this court and its decision was a proper exercise of the court's judicial discretion. Accordingly, the petition for writ of certiorari should be denied.

POINT III

Petitioner has failed to cite any reason to justify the issuance of an extraordinary Writ.

Petitioner seeks an extraordinary Writ to the United States District Court Judge before whom the cases are pending. Specifically, he seeks to disqualify the District Court Judge "due to his bias, prejudice and vindictiveness against the Petitioner. . . ." (Petition for Writ of Certiorari, p. 28). The only fact Petitioner cites for these conclusions is that the District Court Judge has rendered decisions adverse to the Petitioner and thereafter denied Petitioner's motion for recusal. As the District Court stated, in its Memorandum decision denying the motion for disqualification "Adverse rulings in and of themselves are not a sufficient basis for disqualification." (App. 32).

United States Supreme Court Rule 26 provides the issuance of an extraordinary Writ is a matter of discretion which is "sparingly exercised" and in order to justify the exercise of that discretion, Petitioner must show that the Writ will (a) aid in the Court's Appellate jurisdiction; (b) that there are exceptional circumstances warranting the exercise of the court's discretionary powers, and (c) that adequate relief cannot be had in any other form or from any other Court.

Not only has Petitioner failed to establish the elements set forth under Rule 26 but, also, has failed to even allege those elements. Accordingly, the Petition for an issuance of an extraordinary Writ to the United States District Court should be denied.

Conclusion

For the reasons set forth in Points I and II, Petitioner's Writ for Certiorari should be denied. For the reasons set forth in Point III, the Petition for an Extraordinary Writ to the District Court Judge should also be denied.

Dated: Buffalo, New York
September 29, 1986

Respectfully submitted,

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